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IN THE

Supreme Court of the United States

October Term, 1967
No. 991

In the Matter of the Estate of
MARCELLUS LINDSEY JOSLYN, also known as MARCELLUS L. JOSLYN, and as M. L. JOSLYN,
Deceased.

MARCELLUS N. JOSLYN, *Petitioner,*

vs.

SUPREME COURT OF CALIFORNIA, *Respondent.*

SUPREME COURT OF CALIFORNIA, MERRITT L. JOSLYN, MARY C. PARKER CURRIVAN, RONALD MERRITT JOSLYN, JOY LOUISE MacNULTY, JOYLON DAVID JOSLYN, THEODORE NEWELL JOSLYN, CELIA ALICE PARKER, M. WESLEY PARKER, III, MARCELLUS JOSLYN PARKER, ALICE JOSLYN, WILLIAM DWIGHT JOSLYN, PENNY IRENE JOSLYN, MARCELLUS LeFEVRE JOSLYN, MARINA ELAINE JOSLYN, LOIS E. MENDENHALL, MRS. MARY R. SHOFF CAREY, ROBERT F. DOLAN, BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY, and ROBERT D. MacDONALD, individually and as Executor of the Last Will of MARCELLUS L. JOSLYN, Deceased, *Real Parties in Interest.*

BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY, *Respondents.*

Petition for Writ of Certiorari Directed to the Supreme Court of the State of California.

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SUBJECT INDEX

	Page
Jurisdiction	3
The Facts	3
Statutes and Constitutional Provisions Involved	4
Opinion Below	5
Questions Presented by This Writ	13
Reasons for Granting the Writ	16

INDEX TO APPENDICES

Appendix 1. Fourteenth Amendment	1
Appendix A. Statutes Involved	2
Appendix B. Admission of Will to Probate	8
Appendix C. Minutes of May 11, 1967	9
Appendix D. Certificate	10

TABLE OF AUTHORITIES CITED

Cases	Page
Abelleira v. District Court of Appeal, 17 Cal. 2d 280	10
Beaufort Concrete Co. v. Atlantic States Construction Co., 384 U.S. 1004, 16 L. Ed. 2d 1018	16, 21
Boyd v. United States, 116 U.S. 616	7, 16, 25
City of Los Angeles v. Superior Court, 51 Cal. 2d 423	10
Cole v. Arkansas, 333 U.S. 196, 92 L. Ed. 644	15
Crummer v. Beeler, 185 Cal. App. 2d 851	10
Erickson, Estate of, 140 Cal. App. 520	10
Graves, Estate of, 202 Cal. 258	10
Hovey v. Elliott, 167 U.S. 409	7, 16, 24
Link v. Wabash Railroad Co., 370 U.S. 626, 8 L. Ed. 2d 734	18
Lund v. Superior Court, 61 Cal. 698	9, 10, 12, 19, 20
Mooney v. Holohan, 294 U.S. 103, 79 L. Ed. 791	15
Morrison, Estate of, 125 Cal. App. 504	10
Societe Internationale pour Participations Industrielles v. Rogers, 357 U.S. 210, 2 L. Ed. 2d 1255	9, 16
Surowitz v. Hilton Hotel Corporation, 383 U.S. 363, 15 L. Ed. 2d 807	24, 26
Twin Lock, Inc. v. Superior Court, 52 Cal. 2d 754	10

Rules — Page

Federal Rules of Civil Procedure, Rule 23 26
Rules of the Supreme Court, Rule 21 3
Rules of the Supreme Court, Rule 22 3
Rules of the Supreme Court, Rule 23 3
Rules of the Supreme Court, Rule 23(f) 3

Statutes

California Civil Code, Sec. 2235 10
California Code of Civil Procedure, Secs. 2030-2034(3) 13
California Code of Civil Procedure, Sec. 2034 ..... 4, 5, 6, 8, 10, 20
California Code of Civil Procedure, Sec. 2034(3) 8, 9, 13, 14, 28
California Code of Civil Procedure, Sec. 2034(iii) 4, 7
California Constitution, Art. I, Sec. 1 9
California Probate Code, Sec. 370 4
California Probate Code, Sec. 374 4
California Probate Code, Sec. 380 ..... 4, 13
California Probate Code, Sec. 385 4
California Probate Code, Sec. 1200 19
California Probate Code, Sec. 1230 4
California Probate Code, Sec. 1233 4
California Probate Code, Sec. 1240 4
United States Code, Title 28, Sec. 1257(3) 3
United States Constitution, Fifth Amendment 9, 16
United States Constitution, Fourteenth Amendment 2, 4, 7, 8, 9, 12, 13, 14, 15, 16, 17, 19, 28

Textbook

Louisell, Modern California Discovery, p. 354 9

IN THE

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October Term, 1967
No. 899

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MARCELLUS N. JOSLYN,
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Real Parties in Interest.

BALDO M. KRISTOVICH, Public Administrator, ILSE AUDREY POLERI, MARCIA HARRIET JOSLYN SILL, MARY ALICE GURLEY,
Respondents.

Petition for Writ of Certiorari Directed to the Supreme Court of the State of California.

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Marcellus N. Joslyn and petitions this Honorable Court for a writ of certiorari directed to the Supreme Court of the State of California, to review and reverse an order and judgment denying a petition for writ of prohibition and mandate and any other appropriate writ to reinstate the remittitur from a dismissal of an appeal from a will contest of a $15,000,000 estate dismissed for alleged failure to comply with a pretrial order of discovery and thus arbitrarily to take property rights away from him in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, the property rights of inheritance of his share of his father's $15,000,000 estate. The Supreme Court of California denied a plenary Writ of Prohibition and Mandate, and any other appropriate writ on October 11, 1967, raising the question of denial of due process of law under the Fourteenth Amendment to the United States Constitution in arbitrarily dismissing petitioner's post-probate amended will contest without a hearing on the merits of the invalidity of his aged father's will, written by the lawyer-executor for the father when the latter was 89 years old and had suffered several strokes and under the lawyers influence. The will excluded the four children of the father from any financial benefits of the $15,000,000 estate.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1257-(3), United States Code, and Rules 21, 22 and 23, particularly 23(f), of this Court.

A petition for a writ of prohibition and mandate or any other appropriate writ raising constitutional questions was duly filed in the Supreme Court of California, and denied on October 11, 1967.

This petition for certiorari is presented within 90 days of the orders and judgments for which this writ is sought.

The Facts.

Petitioner is the eldest son and natural object of the bounty of his father, Marcellus Lindsey Joslyn who died on June 30, 1963 at the age of 90 in Los Angeles, California. He had four children, George R. Joslyn, now deceased; Merritt L. Joslyn, 322 East 8th Street, Hinsdale, Illinois; Mary J. Currivan, 345 Saltair Road, Brentwood Heights, Los Angeles, California.

Petitioner's father was highly successful head of a national manufacturing company which manufactures electrical telephone equipment.

In June or July of 1947 the elder Joslyn employed a lawyer named Robert D. MacDonald to act with him in certain real estate ventures and later all his business affairs. MacDonald became secretary, tax advisor, attorney and business associate thereafter throughout the father's lifetime, and thus assumed a highly confidential relationship and position of great influence upon the elder Joslyn. During the last years of the elder Joslyn's life he had several strokes and was quite ill and feeble.

When the elder Joslyn was 89 years old, MacDonald drew a will for him, which left nothing but token legacies of furniture and furnishings of a value of no more than $3,000 each, but named MacDonald as executor of the large estate and set up fifteen trusts for the grandchildren of which MacDonald would receive 3 percent per annum as testamentary trustee and have absolute discretion of the operation of the trusts. He would also be named as successor trustee of Marcellus Joslyn of the Alice Joslyn trust. Alice Joslyn had died March 22, 1949 in Los Angeles, naming her husband as testamentary trustee of her estate with power of appointment in his will of a successor trustee. The will drawn by MacDonald named MacDonald as successor trustee.

The will of Marcellus Lindsey Joslyn, as drawn by MacDonald, appears to have an alteration on its face as to the date when it was subscribed by Marcellus Lindsey Joslyn. (see page 41 Petition to recall remittitur, which alteration could invalidate it.

The will itself, on its face, appears to be an unnatural one, since it excludes all the children, the natural object of Marcellus Lindsey Joslyn's bounty.

Statutes and Constitutional Provisions Involved.

The statutes involved are contained in Appendix A, to wit: Sections 370, 374, 380, 385, 1230, 1233 and 1240 of the Probate Code of California, and Sections 2034, and 2034(iii) Code of Civil Procedure of California. The Fourteenth Amendment to the United States Constitution.

Opinion Below.

The Supreme Court of California did not publish an opinion. The Supreme Court denied a hearing without opinion October 11, 1967 from the petition for Writ of Prohibition and Mandate and any other appropriate writ.

Under the terms of the will of Alice N. Joslyn the trustee by his own will and pursuant to such power he who was her husband, had power to appoint a successor trustee by his own will and pursuant to such power he also appointed Robert D. MacDonald, the young lawyer, as such successor trustee of the Alice Newell Joslyn testamentary trust, which involved being trustee of another $2,500,000 in property with its attendant fees.

Your petitioner filed a will contest prior to probate. On advice of his then attorney, who later became a federal appellate judge (the Hon. Walter Ely), he dismissed the will contest prior to probate in order to give ample time as requested by this attorney for preparation of the will contest. Later he filed a will contest after probate which was the subject of many attempts—ultimately successful—to knock out the post probate will contest on its merits by means of unanswered requests for discovery under Section 2034 of the Code of Civil Procedure and for alleged failure by petitioner to comply with such requested discovery.

Petitioner had given 5 days of deposition prior to the admission of the will to probate.

The Procedure followed by Executor-Attorney-Trustee MacDonald thereafter because a football of legal (or illegal) tactics to prevent trial on the merits of the will contest and validity of the will.

Although the probate practice is governed by the California Probate Code and is only governed by Part 2 of the Code of Civil Procedure when not covered by the Probate Code, nevertheless, many attempts were made to obtain late discovery just before trial and a motion was made to dismiss petitioner's will contest on the basis of failure to comply with Section 2034 of the Code of Civil Procedure, and again grant discovery at the late date requested.

At the time of the hearing on the motion, Mr. Joslyn's then attorney, Phill Silver, had an application before the California Court for protective order and other proceedings which had not been passed upon by the Court. No testimony was taken by the trial court at the hearing on the motion to dismiss petitioner's will contest on October 5, 1966 as to his good faith in his various contests nor as to whether the presumption of undue influence which covered the lawyer-trustee was overcome by testimony of any kind. Instead, the trial judge without notice arbitrarily and without testimony granted a motion to dismiss the post probate *will* contest.

The notice of motion was to dismiss the *will contest,* not the amended will contest which was filed after demurrer to the will contest. The court nevertheless later granted a motion without further notice or hearing or proceedings to dismiss the $15,000,000 *amended* will contest, the amendment being the result of the trial court having sustained demurrers to the pleadings which was followed by subsequent amendments to conform to the trial court's requirements of amending the pleadings. Nevertheless, the trial judge arbitrarily without notice or hearing dismissed the amended will

contest and made purported findings without testimony and without hearing.

The result of such proceeding was to penalize the contestant the eldest son of the decedent, to the extent of his proportionate share of the $15,000,000 estate and also to act as executor of the will of his deceased mother and to direct and handle the estate of his mother, another $2,500,000 penalty.

The questions involved here are whether a state may arbitrarily dismiss an amended will contest without notice and without granting a hearing on the merits of the same, thus taking away the property of the petitioner to the extent of more than $3,500,000 and other rights, as a penalty, without violating due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and whether the statute (Section 2034 (iii) C.C.P. of California) inherently and as construed and applied in this case, which allows *pro confesso* to take property as a confession of judgment is arbitrary and capricious and in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and as laid down as early as *Boyd v. United States,* 116 U.S. 616, and again repeated in *Hovey v. Elliott,* 167 U.S. 409.

Three days before the trial was to start on the merits, to-wit: October 5, 1965, pursuant to the notice of trial previously served on the petitioner herein that his post probate trial of the amended will contest was to start on October 6, 1965, later postponed to October 8, plaintiff, through highly regarded influential counsel, was able to get the trial judge to dismiss the post probate will contest and thus terminate the amended

will contest litigation without a trial on the merits and solely because of alleged violation of Code of Civil Procedure, Section 2034(3).

Petitioner appealed the decision and the appeal was dismissed and the Supreme Court upheld the dismissal without a hearing. In none of the events has the petitioner had his day in court on the amended will contest before a jury. Thus, the rules of "discovery" provided by Section 2034 of the Code of Civil Procedure, Subsection (3), became a booby trap for petitioner and his then counsel in which the plaintiff, through more influential counsel, was able to confiscate petitioner's property rights to determine, under the will, whether he is entitled to one-fourth of the $15,000,000 estate and, in turn, entitled to become one of the trustees of the testamentary trusts under his mother's estate because of the voiding of the power of appointment under the will.

Petitioner thus challenged the constitutionality of Section 2034(3) of the Code of Civil Procedure of the State of California, inherently and as construed and applied in this case, in a petition to recall the remittitur, which petition is a part of the record in this case. In this petition, the petitioner herein first challenged the constitutionality of the procedure and proceedings under the Fourteenth Amendment to the Constitution of the United States. It is contained in the grey covered document that is a part of the record herein.

On page 22 of the said document, the petitioner denied that there had been a wilful refusal to grant discovery in any respect whatsoever. Even if there were refusal of discovery, which we deny, the sanctions provided by the California Legislature are constitu-

tionally limited to effectuate its objects, namely, to secure discovery and not to penalize the litigant or to forfeit property to which he is entitled. The right to receive property in an estate is a right which is guaranteed by Article I, Section 1 of the Constitution of the State of California and the Fourteenth Amendment to the Constitution of the United States. (See: Louisell, Modern California Discovery, p. 354; and the limits of discovery in Fifth and Fourteenth Amendments; *Societe Internationale pour Participations Industrielles v. Rogers,* 357 U.S. 210, 2 L. Ed. 2d 1255.)

Your petitioner again challenged the constitutionality of Section 2034(3) of the California Code of Civil Procedure in the petition to the California Supreme Court for a writ of prohibition and mandate and any other appropriate writs.

The petition or writs of prohibition and mandate were duly filed and denied on October 11, 1967. This petition for certiorari is being filed within 90 days of that date.

This is a petition for certiorari of the denial of a writ of prohibition and mandate and any other appropriate writ. Subsequent to our having filed the petition to recall the remittitur on the grounds that the federal constitutional rights under the 14th Amendment U.S. Constitution were violated it was discovered that the Supreme Court of California had rendered decisions that a writ of prohibition and mandate would lie for hearing on the issue of the imposition of sanctions for failure to respond to discovery *Lund v. Superior Court,* 61 Cal. 698, 713 and we therefore filed a connection with this identical matter a petition for a

writ of Prohibition and mandate and any other appropriate writ entitled Marcellus N. Joslyn v. Superior Court and the record of those proceedings have been certified and brought up to this court.

The California cases have held that a writ of Prohibition lies to attack in that state if the imposition of sanctions by the Superior Court under the provisions of the Code of Civil Procedure, Section 2034, would constitute an excess of power of the court as defined by statute. (*Twin Lock, Inc. v. Superior Court,* 52 Cal. 2d 754; *City of Los Angeles v. Superior Court,* 51 Cal. 2d 423; *Abelleira v. District Court of Appeal,* 17 Cal. 2d 280, 287 *et seq.; Crummer v. Beeler;* 185 Cal. App. 2d 851; *Lund v. Superior Court,* 61 Cal. 2d 698.)

We never had a day in court on our proposed amended will contest, which is an adversary proceeding for the recovery of property claimed to be unlawfully taken or about to be taken from the ownership of the contestant. (*Estate of Morrison,* 125 Cal. App. 504, 507.) Thus a will contest or amended contest is a proceeding *in rem* to determine property rights of persons who live in the shadow of the deceased; and are entitled to the property to be left behind.

To establish a *prima facie* case all that the contestant need show is that the purported writ was drawn by MacDonald the attorney for Joslyn and that he benefited financially from it. The presumption of undue influence follows California Civil Code 2235; *Estate of Graves,* 202 Cal. 258, 262; *Estate of Erickson,* 140 Cal. App. 520.

Alteration of the will or date of its execution, exclusion of the children, the natural objects of the

bounty of the decedent, his age (89) at the time of its drawing, his condition of health or lack of it would also be important factors in a contest before a jury.

The amended will contest in this case involves rights of the children of whom petitioner is one—the oldest son of decedent and involved the question of undue influence, which California presumes exists in the case of an attorney who writes a will in which he benefits, as the evidence in this case shows the executor-attorney would benefit in this case.

On July 22, 1965 attorney Ernest J. Zack, signed and filed a certificate of readiness for trial, a copy of which is contained in the petition to Recall the Remittitur. Under California law and rules of trial, no further discovery was supposed to take place after the certificate of readiness is filed unless special leave of court was obtained, which it was not in this case.

Thereafter, without such leave of court, attorney Zack attempted to conduct further discovery proceedings and was met with the objections by petitioner's then attorney that the further taking of depositions and other proceedings was for the purpose of harassment and that the petitioner was not required to answer any further questions. Petitioner acted on advice of counsel. Petitioner's then attorney filed a petition for a protective order, alleging that a certificate of readiness had been filed by attorney Zack. Attorney Zack in a declaration under penalty of perjury denied that such a certificate had been filed. In spite of this declaration, the certificate was filed and a copy is enclosed as Appendix D to the petition to recall the remittitur, page 13. The Supreme Court of California, in denying petitioner a hearing, acted with this false denial before it.

Further, the dismissal by the court as of October 5, 1965, three days before trial was of the "will contest". Without any further notice or hearing other proceedings, on the amended will contest, however, the judge dismissed what was really an amended will contest, the amendment having been filed after a demurrer had been sustained to the will contest with leave to amend. Nevertheless, the trial court, without the taking of any testimony as to good faith on the part of petitioner or any other proceedings, then arbitrarily and capriciously and in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States dismissed the *amended* will contest and deprived petitioner of a trial *on its merits*. Unless this Court reverses the orders and judgments below, petitioner will be deprived of his day in court on the right given by California law to contest the validity of his father's purported last will, distributing nothing but furniture and bric-a-brac of little value to the children—the natural objects of his bounty, and a $15,000,000 estate to others.

In *Lund v. Superior Court,* 61 Cal. 2d 698, Mr. Justice Peters said that he was of the opinion that an appeal would not lie from an order refusing discovery but that the proper remedy in California was by a writ of prohibition and mandate. We followed with the petition which the California Court denied and which is here sought to be reviewed by certiorari.

Questions Presented by This Writ.

1. Whether the petitioner has been denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States where his post probate amended will contest, authorized by the laws of the State of California (Section 380 Probate Code of California), has been stricken three days prior to trial because of alleged failure to answer questions at a deposition hearing subsequent to a certificate of readiness being filed and that he failed to serve and file answers to interrogatories requested after the certificate of readiness was filed by defendant and under the discovery procedure of Sections 2030-2034(3) of the Code of Civil Procedure of the State of California, and while an appeal was pending from the denial of a probative order.

2. Whether a statute of a state, which authorizes the striking of a party's pleadings and denial of a trial on the merits of his claim for his share of a $15,000-000 estate to which he would be entitled if he proved the will invalid, is unconstitutional and void where it authorizes summary proceedings of striking a complaint for alleged failure to comply with discovery statutes of the state, to-wit: Section 2034(3) of the Code of Civil Procedure of the State of California.

3. Whether a state may forfeit and deprive a person of his property or his property rights arbitrarily and capriciously and without a hearing on the merits for alleged failure, if it occurred, to comply with discovery proceedings and thus strike the plaintiff's complaint attacking the validity of his aged father's will for undue influence and other reasons and deny him a trial on the merits of his claims before a jury author-

ized by law of a state without violating due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

4. Whether a Section 2034(3) of the Code of Civil Procedure of the State of California, inherently and as construed and applied in this case, is violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and does it permit the taking of property arbitrarily and capriciously and wihout a hearing on the merits in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

5. Whether the denial of an amended will contest, on its merits before a jury, authorized by the laws of a state, is a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and whether a state, or a judge, thereof because of strong influence of counsel, may dismiss such a post probate amended will contest arbitrarily and capriciously without a hearing on the merits of the post probate amended will contest and thus deprive a petitioner, the eldest son and the natural object of the bounty of a decedent, of his share of a $15,000,000 estate of his father and his right to the appointment as trustee of the testamentary trust in the $2,500,000 estate of his mother.

6. Whether a dismissal of an amended will contest, based solely upon a dismissal of a will contest, which

will contest was demurred to and amended in a subsequently authorized pleading, was a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States where there was no further hearing on the amended will contest and no notice or opportunity to petitioner or his attorney to be present at the proceeding dismissing the amended will contest, whether such proceeding is in violation of the law laid down in *Cole v. Arkansas,* 333 U.S. 196, 92 L. Ed. 644.

7. Whether a false statement to a State Supreme Court that a certificate of readiness has not been filed and upon which that court acts in denying a hearing so fatally infects the fairness and decision of that hearing as to require this Court to reverse the judgment and order below and to remand the case for further consideration upon that basis alone. (*Mooney v. Holohan,* 294 U.S. 103, 79 L. Ed. 791.)

8. Whether a will has been truly and regularly admitted to probate where no foundation was laid for the testimony of the witnesses and where the statutory presumption of undue influence and fraud on the part of the writer of the will, an attorney who benefits from it, has been overcome and whether the hearing at the time that the will was later admitted, to-wit: April 29, 1964, was conducted without notice or hearing on its then admission and whether the procedure therein without a hearing at that time violated due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Reasons for Granting the Writ.

This Court should grant a hearing to hold that "discovery" statutes cannot be used as booby traps for litigants, that influential and exceptionally able counsel cannot persuade judges to dismiss a will contest arbitrarily and thus deprive a litigant of his property rights which are inherent in the properties involved in a will and thus to deny a litigant his day in court.

This Court now has the opportunity in this case to lay down the law that the purpose of discovery may be to aid in speeding litigation but is not a means or a tool of taking away property or property rights arbitrarily and capriciously.

This Court has, as early as *Boyd v. United States,* 116 U.S. 616, held that a statute which provides for arbitrary confiscation of property is a violation of due process of law under the Fifth Amendment to the Constitution of the United States. The same provisions have been upheld by this Court in *Hovey v. Elliott,* 167 U.S. 409, 42 L. Ed. 215. Again, this Court has commented extensively on the fact that such proceedings may be a violation of due process of law under the Fifth and Fourteenth Amendments. (*Societe Internationale pour Participations Industrielles v. Rogers,* 357 U.S. 197, 2 L. Ed. 2d 1255.)

Mr. Justice Black in *Beaufort Concrete Co. v. Atlantic States Construction Co.,* 384 U.S. 1004, 16 L. Ed. 2d 1018 (June 20, 1966), in a lengthy dissenting opinion pointed out that there was a growing number of cases in which the Federal Rules of Civil Procedurre had been used to prevent the fair and just determination of a lawsuit on the merits. (16 L. Ed. 2d 1019.)

The same situation now exists among the states. It is time that this Court laid down its proper rule of law guiding the various states of the country that such a procedure is, in fact, unconstitutional and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; that to deny one who has, in effect, a property right in the subject matter of the litigation cannot be denied his day in Court by the trick and device of his purported failure to respond to discovery in the form that the other party seeks to have it. This case squarely raises the question that discovery was granted at great length in the early stages of the proceedings; that a certificate of readiness had been filed by defense counsel, who would benefit from the dismissal of the case and a failure to hear it on the merits, a proceeding which has been upheld throughout all of the courts of the State of California although its right to do so has been challenged under the due process clause of the Fourteenth Amendment to the Constitution of the United States under our petition to recall the remittitur in the Court of Appeal of the State of California, Second Appellate District, Division Two, in the Supreme Court of California, and in the petition for writ of prohibition and mandate directly in the Supreme Court of the State of California, which denied the same.

Here, the petitioner was represented by counsel at the last hearing at which he attended and answered some of the questions but declined to answer others on the ground of harassment (he having given give days of deposition testimony earlier), now was faced with dismissal of his amended will contest involving the validity of his aged father's will written by an attorney

employed by his father and presumptively the result of undue influence wherein the attorney benefited widely from the contents of the will.

We ask this Court also to re-examine and reverse its holding in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 8 L. Ed. 2d 734, where it, in effect, held the sin of the lawyer fell upon the client in a dismissal of a diversity negligence action under circumstances there presented where the error was based upon the error of the attorney and not of the client.

Like the expression of Judge Schnackenberg in his dissent to the opinion of the majority for the Seventh Circuit upholding the dismissal in *Link v. Wabash*, when he said

> "The order now affirmed has inflicted a serious injury upon an injured man and his family who are innocent of any wrongdoing. Plaintiff's cause of action . . . was his property. It has been destroyed. The District Court to punish a lawyer has confiscated another's property without process of law which offends the Constitution. . . . Because it was either necessary or proper to visit the sin of the lawyer upon his client I would reverse." (291 F. 2d 542. 548).

Here, too, the orders of the court below dismissing the post probate will contest (and denying prohibition and mandate) have inflicted a serious injury upon the petitioner, Marcellus N. Joslyn. His cause of action was his property. It has been destroyed. The California courts, who have punished what was claimed to

be a failure of discovery under the statute, have now confiscated his property without due process of law, which offends the due process clause of the Constitution of the United States. We contend that state does not have such a constitutional authority. It is not proper, constitutional or necessary to visit the advice, if wrongful, and the sins of the lawyer upon his client nor to arbitrarily and capriciously take away a valid cause of action of a post probate amended will contest.

The order of Judge Wright in dismissing the post probate amended will contest was not based upon any testimony taken at the time of the dismissal. No testimony was taken regarding the good faith of the petitioner nor were any other sanctions attempted to be imposed such as contempt and to give him a further opportunity to purge himself of that contempt. The dismissal was arbitrarily granted on the motion of the attorneys who moved to dismiss the "will contest" but later the judge entered an order with purported findings of fact and conclusions of law not based upon any testimony upon the amended will contest, without any notice or hearing of the same and in violation of the requirements of Section 1200 of the California Probate Code requiring notice thereof. The whole proceeding was an arbitrary and capricious action in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In *Lund v. Superior Court,* 61 Cal. 2d 698, Justice Peters has stated that prohibition and mandate are the

proper remedies where the court below has acted in excess of jurisdiction in discovery proceedings. Nevertheless, the court below denied the application for prohibition and mandate for which certiorari is here sought, the entire record being before the Court in this application.[1]

This Court has, in the last few years, had many occasions to determine the great shift in the practice of

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[1]"Generally, no order or judgment in a civil action is appealable unless it is embraced within the list of appealable orders provided by statute (Code Civ. Proc., § 963). The order here under review purports to be an order levying sanctions under section 2034 of the Code of Civil Procedure (sanctions for failure to make discovery when required). There seems to be no case deciding whether such an order is appealable. It is only appealable if it can be considered to be a final judgment on a collateral matter growing out of the action (*Sjoberg v. Hastorf*, 33 Cal.2d 116, 119 [199 P.2d 668]). The better view is that an order made for the purposes of furthering discovery proceedings, or granting sanctions for refusal to make discovery, is not appealable (*Huenergardt v. Huenergardt*, 218 Cal.App.2d 455 [32 Cal.Rptr. 714]; *Farnham v. Superior Court*, 188 Cal.App.2d 451, 455 [10 Cal.Rptr. 615]). The instant order combined an order requiring the *parties* to perform future acts in furtherance of discovery with an order requiring nonparty witnesses to make payments to parties' attorneys. It is, therefore, very questionable as to whether respondent court intended it as a final order in a collateral proceeding. Certainly, the fact that it purported to be a judgment against persons who were not parties to the action in which it was entitled, and in favor of persons who were not parties, creates grave doubt as to the standing of these petitioners to appeal. But we do not find it necessary to decide this question of the order's appealability. If we assume, *arguendo*, that the order was appealable, that fact alone would not prohibit recourse to one or another of the extraordinary writs when circumstances indicate that appeal would be an inadequate remedy. Regardless of the ultimate ability to appeal, prohibition is an appropriate remedy to circumvent the imposition of sanctions applied in excess of the respondent court's jurisdiction (*City of Los Angeles v. Superior Court*, 51 Cal.2d 423, 429 [333 P.2d 745]; *Twin Lock, Inc. v. Superior Court*, 52 Cal.2d 754, 758 [344 P.2d 788])." *Lund v. Superior Court*, 61 Cal.2d at 709, 710.

law and whether so-called discovery under the new rules of federal procedure as well as under state procedure constitute a booby trap for lawyers and their clients and by means of alleged unanswered discovery to strike pleadings and deprive litigants of their day in court, and a trial by a jury of peers on the merits.

In this respect, Mr. Justice Black said in *Beaufort Concrete Co. v. Atlantic States Construction Co.,* 384 U.S. 1004, 16 L. Ed. 2d 1018, 86 S. Ct. 1908, a federal case, as follows:

> "I would grant certiorari in this case. This is another in a growing number of cases in which the Federal Rules of Civil Procedure have been used to prevent the fair and just determination of a lawsuit on the merits. See, e.g., Lord v Helmandollar, 348 F2d 780, cert denied, 383 US 928, 15 L ed 2d 847, 86 S Ct 929, Black, J., dissening; Riess v. Murchison, cert denied, 383 US 946, 16 L 3d 2d 209, 86 S Ct 1196, Black, J., dissenting; Link v Wabash R. Co., 370 US 626, 8 L ed 2d 734, 2 S Ct 1336, Black, J., joined by The Chief Justice, dissenting. In this case I think the summary judgment entered against petitioner by the District Court and affirmed by the Court of Appeals should be reversed and the case remanded to the District Court so that petitioner can have his day in court. The facts in summary are these. Petitioner supplied respondent with concrete to buid some docks and warehouses near Savannah, Georgia. When respondent did not pay for all the concrete supplied, petitioner brought this suit to recover the balance, about $90,000. Respondent moved for summary judgment supporting its mo-

tion with several affidavits stating that a large portion of petitioner's concrete was defective. On the day set for hearing petitioner filed three affidavits with the court which asserted that the concrete furnished was not defective and that if it was it became so because respondent's agent had ordered it to be watered down. The District Court, however, refused to consider petitioner's affidavits on the ground that they had not been served 'prior to the day of hearing' as provided by Rule 56(c) of the Federal Rules, and on the basis of the pleadings and respondent's affidavits alone, the court entered summary judgment for respondent. The Court of Appeals affirmed stating that under the Federal Rules the trial court had broad discretionary power either to accept or reject petitioner's untimely affidavits but that the court did not abuse its discretion in rejecting the affidavits. The Court of Appeals went on to state that 'Without the excluded affidavits, little is left to the plaintiff's case—nothing in fact, but the bare allegation in the complaint that [plaintiff] furnished adequate concrete for which it was not fully paid.' Thus for the delay of a few hours—less than one day—in serving affidavits on respondent's counsel, petitioner was deprived of all opportunity to have the court consider its affidavit evidence, which if true, would have entitled it to collect the $90,000 balance for the concrete supplied.

I find it entirely at odds with a fair system of trying lawsuits to throw out a litigant's case because his lawyer for negligence or some other reason fails by less than 24 hours to satisfy one of

many procedural time limits. From the beginning to the end of a lawsuit a lawyer must meet a host of time limits for filing papers. Surely a judge should not have discretion to enter final judgment at will every time a slight lapse occurs which may delay for half a day or so the service of one of a multitude of papers that must be served during the trial and appeal of a lawsuit.

The summary judgment entered below indicates, in my opinion, a failure to appreciate that 'The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion.' Surowitz v Hilton Hotels Corp., 383 US 363, 373, 15 L. ed 2d 807, 814, 86 S Ct 845. If the Federal Rules, as the Court of Appeals holds, repose in the district courts discretion to deprive parties of a full trial on their claims in circumstances like these, then it indicates to me that these rules exalt strict obedience to formality and 'paper work' high above the fair and just trial of lawsuits. Nevertheless, the Federal Rules have been administered this way time and again. As I pointed out in my dissent to the new Federal Rules recently adopted:

Cases coming before the federal courts over the years now filling nearly 40 volumes of Federal Rules Decisions show an accumulation of grievances by lawyers and litigants about the way many trial judges exercise their almost unlimited discretionary powers to use pretrial procedures to dismiss cases without trials. In fact, many of these cases indicate a belief among many judges

and legal commentators that the cause of justice is best served in the long run not by trials on the merits but by summary dismissals based on out of court affidavits, pretrial depositions, and other pretrial techniques. 384 US 1034, 15 L 2d 2d lxxvi.

'The filing of court papers on time is, of course, important in our court system. But lawsuits are not conducted to reward the litigant whose lawyer is most diligent or to punish the litigant whose lawyer is careless. Procedural paper requirements should never stand as a series of dangerous hazards to the achievements of justice through a fair trial on the merits.' "

Earlier, Mr. Justice Black had urged this Court to heed to the language of *Hovey v. Elliott,* 167 U.S. 409, which is quoted herein, also *Surowitz v. Hilton Hotel Corporation*, 383 U.S. 363, 15 L. Ed. 2d 807.

In *Hovey v. Elliott,* 167 U.S 409, this Court said:

"The demonstration of the unsoundness of the contention that courts of equity have claimed and exercised the power to suppress an answer and thereupon render a decree *pro confesso,* which results from the foregoing review of the authorities, is strengthened by the reflection that if such power obtained, then the ancient common law doctrine of 'outlawry,' and that of the continental systems as to 'civil death,' would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen.

'It being therefore clear that the supreme court of the District Columbia did not possess

the power to disregard an answer which was in all respects sufficient and had been regularly filed, and to ignore the proof taken in its support, the only question remaining is whether a judgment based upon the exercise of such an assumed power is void for want of jurisdiction, and may therefore be collaterally attacked. It cannot be doubted that where a judgment is rendered without the issuance and service of summons against a party who did not enter an appearance, the court rendering it is without jurisdiction to do so, and it can be assailed as void whenever presented as a muniment of right against another. Looking at the substance and not the form of the decree in the case of *Hovey v. McDonald,* 109 U. S. 150 [27:888], upon which the rights of the plaintiff in error depend, it is plain that the judgment was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear to be heard in his defense? As said by this court in *Postal Teleg. Cable Co. v. Adams,* 155 U. S. 689 [39:312, 5 Inters. Com. Rep. 1]: 'The substance, and not the shadow, determines the validity of the exercise of the power.'"

As early as *Boyd v. United States,* 116 U.S. 616, this Court has ruled against arbitrary judgments by which property could be taken *pro confesso* and without due process of law. That decision has been the landmark case for all cases since that time. There has been a great shift of procedure in connection with at-

tempting to eliminate cases by summary judgments and by taking default or striking pleadings and on the basis of lack of discovery. These proceedings, we respectfully submit, pervert instead of advance justice and increase the necessity of litigants going to higher courts and filling the higher courts with plenty of appeals in an endeavor to protect themselves and to get rights they have been arbitrarily and capriciously denied.

The effect of this Court's denial of a hearing would be to deprive the natural children of the bounty of the decedent and of their rightful share of the property he left behind. It would validate a will which on its face appears to have an altered date and which was written by an attorney whom the laws of the State of California say makes the document presumptively the result of undue influence.

It is therefore important that this Court grant a hearing herein and set at rest for all of the states of the country the limit to which this type of sanctions in respect to discovery can go and to protect litigants on the basic rights of American justice to have a trial on the merits and before juries.

In *Surowitz v. Hilton Hotel Corporation*, 383 U.S. 363, at 373, 15 L. Ed. 2d 808, at 814, the Court said:

> "If the rules of procedure work as they should in an honest and fair judicial system they not only permit but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits."

It refers to Rule 23 of the Federal Rules of Civil Procedure but its language is comparable here, that this

rule, like the other civil rules, was written to further, not defeat, the ends of justice. A serious fraud is charged here. As in that case, petitioner here should have been permitted to prove his charges of undue influence and other charges made in his post probate amended will contest which were prepared by an able probate lawyer and verified under oath and should not have been dismissed just three days before the trial was ready to start on its merits and thus to deprive not only a trial on its merits but a jury trial which the law requires in will contests in California.

This Court has spoken of the denial of rights to poor litigants who cannot afford depositions and discovery as compared with those who can. However, there is another class of litigants who are able to secure able and influential counsel in the case. Thus, victory goes to the influential, not to the just. Although this is a country of laws, it is administered by men and men are naturally subject to influences of friendship and associations and other things that may well turn the tide and aid in victory in a lawsuit where the decision as here, is arbitrary and capricious. It thus secures results without a trial on the merits and without a trial before a jury, as authorized and required by law to be had, and as the one means of the protection of all citizens. No better means than the jury system, has been evolved in dealing with equal justice. In this particular case, the respondent's counsel of record at the time of the dismissal was a very able lawyer who secured the dismissal and who shortly thereafter became a Superior Court judge in Los Angeles County. Another member of the firm of these very able and influential lawyers was the son of a Supreme Court jus-

tice of California who now is also a Superior Court judge. Thus, this firm has had much more than money could achieve. It has had personal and highly successful influence in achieving its objective and in securing a dismissal of the amended will contest of this out of state client.

We pray that this court reverse the judgment of the Supreme Court of California dismissing the petition for writ of prohibition and mandate and any other appropriate writ (certiorari) and order the same granted with directions to that court to order to reinstate the amended will contest.

We ask for our day in court before a jury on the merits of the amended will contest. We ask this Court to hold that Section 2034(3) of the Code of Civil Procedure of California, inherently and as construed and applied in this case, is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States in respect to the facts of this case and that the case be remanded to the state courts for trial before a jury on the merits of the amended will contest.

Respectfully submitted,

MORRIS LAVINE, ESQ.,
Attorney for Petitioner Marcellus N. Joslyn.

APPENDIX 1.

AMENDMENT XIV.

1. ; nor shall any state deprive any person of life, liberty or property without due process of law.

APPENDIX A.

Statutes Involved.

Section 370, Probate Code of California, Contests Before Probate:

"1 370. *Filing contest; citation; demurrer; answer*

"Any person interested may contest the will by filing written grounds of opposition to the probate thereof at any time before the hearing of the petition for probate, and thereupon a citation shall be issued directed to the heirs of the decedent and to all persons interested in the will, including minors and incompetents, wherever residing, directing them to plead to the contest within 30 days after service of the citation, which shall be made personally or by publication in the manner provided by law for the service of summons in civil actions. Any person so served may demur to the contest upon any of the grounds of demurrer available in civil actions. If the demurrer is sustained, the court may allow the contestant a reasonable time, not exceeding 10 days, within which to amend his contest. If the demurrer is overruled, the petitioner and others interested within 10 days after the receipt of written notice thereof, may jointly or separately answer the contest."

Section 380, Probate Code of California, Contests After Probate:

"§ 380. *Parties who may contest after probate; limitation of time; petition*

"When a will has been admitted to probate, any interested person, other than a party to a contest

before probate and other than a person who had actual notice of such previous contest in time to have joined therein, may, at any time within six months after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate be revoked."

Section 1230, Probate Code of California, Rules of Procedure:

"§*1230. Trial rules; judgments*

"All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. The party affirming is plaintiff, and the one denying or avoiding is defendant. When a party is entitled to a trial by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, must settle and frame the issues to be tried. If no jury is demanded, the court must try the issues joined, and sign and file its decision in writing, as provided in civil actions. Judgment on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions."

Section 1233, Probate Code of California, Rules of Procedure:

"§*1233. Applicability of Code of Civil Procedure Part 2; evidence in uncontested proceedings; evidence of subscribing witnesses*

"Except as otherwise provided by this code or by rules adopted by the Judicial Council, the provisions of Part 2 of the Code of Civil Procedure[1] are applicable to and constitute the rules of practice in the proceedings mentioned in this code with regard to trials, new trials, appeals, and all other matters of procedure.

Section 2034, Code of Civil Procedure of California:

"§*2034. Refusal to make discovery; consequences*

"*(b) (1) Refusal to obey subpoena or order; contempt.* The court may punish as a contempt (i) the refusal of any person to obey a subpoena issued by that court to attend a deposition or to be sworn as a witness, or (ii) the refusal of any person to attend a session of court (either personally or by his attorney) after having been directed to attend in the manner provided in subdivision (a) of this section, or (iii), the refusal of any person to obey any order made by the court under subdivision (a) of this section.

"*(2) Other consequences.* If any party or person for whose immediate benefit the action or proceeding is prosecuted or defended, or an officer, director, superintendent, member, agent, employee or managing agent of any such party or person refuses to obey an order made under subdivision (a) of this section, or if any party or any officer or managing agent of a party refuses to obey an order made under Sections 2019, 2061 or 2062 of this code, the court may make such orders in regard to the refusal as are just, and among others the following:

"(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contests of the paper, or the physical or mental or blood condition of the person sought to be examined, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order:

"(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of the physical or mental or blood condition of the person sought to be examined;

"(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

"(iv) An order requiring the disobedient party or the attorney advising such disobedience to pay to the party obtaining an order under this section the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees.

"(v) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental or blood examination;

"(vi) Where a party has failed to comply with an order under subdivision (a) of Section 2032 of

this code requiring him to produce another for examination, such orders as are listed in (i), (ii), and (iii) of this subdivision of this section, unless the party failing to comply shows that he is unable to produce such person for examination.

"*(c) Expenses on refusal to admit.* If a party, after being served with a request under Section 2033 of this code to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court in the same action for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. If the court finds that there were no good reasons for the denial and that the admissions sought were of substantial importance, the order shall be made.

"*(d) Failure of party to attend or serve and file answers.* If a party or a person for whose immediate benefit the action or proceeding is prosecuted or defended or anyone who at the time the deposition is set is an officer, director, or managing agent of any such party or person willfully fails to appear before the officer who is to take his deposition, after said party or his attorney has been served with a proper notice in accordance with the provisions of subdivision (a) (4) of Section 2019 of this code, or if a party or an officer or managing agent of a party willfully fails to serve *and file* answers to interrogatories submitted under

Section 2030 of this code, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose such other penalties of a lesser nature as the court may deem just, and may order that party or his attorney to pay to the moving party the reasonable expenses in making such motion, including reasonable attorney's fees."

APPENDIX B.

Admission of Will to Probate.

Superior Court of the State of California, for the County of Los Angeles. Dept. 64.

Date: 3-31-64.

Newcomb Condee Judge.

R. D. Gaddis Deputy Sheriff.

P. N. Bowen, Deputy Clerk.

B. Wallace Reporter.

Estate of Marcellus L. Joslyn, etc., Dec'd. 471 032.

NATURE OF PROCEEDINGS:

Matters continued to this date:

(Petn. Probate Will, etc.; Contest) come on for hearing, with counsel appearing as before. Contestant moves for dismissal of his contest, pursuant to his written Request for Dismissal, heretofore filed. Motion is resisted by proponent. After argument, the Court denies said motion. Contestant's motion for a further continuance is denied.

Mary R. Shoff Carey, Margaret J. Middlewood, Mary Hottle and Robert D. Macdonald are sworn and testify for proponents.

The Court finds that prima facie proof of the will has been made and that the will should be admitted to probate. Contestant offers no evidence.

Will is admitted to probate, (date June 29, 1962), Letters Testamentary to issue to Robert D. Macdonald as Executor. Bond $15,000,000/30,000,000. Counsel is directed to prepare findings and decree accordingly.

P. N. Bowen.

APPENDIX C.

In the Court of Appeal of the State of California, Second Appellate District.

Minutes of May 11, 1967.

Division Two.

Estate of Joslyn, Civil No. 31472.

The Court:

Motion to augment record denied. Motions to dismiss appeals are granted.

APPENDIX D.

Superior Court of the State of California for the County of Los Angeles. Department 9.

Court convened at 1:30 P.M. Oct. 5, 1965, present Hon. Donald R. Wright, Judge; W. J. Mason, Deputy County Clerk; L. White, Deputy Sheriff; W. H. Davis, Reporter; and the following proceedings were had:

328-471032 JOSLYN, MARCELLUS L., etc.

Not of mo for ord dismissing Will Contest & for other appropriate relief C.C.P. 2434; Memo of Pts & auth. & declaration in support thereof; Declaration in support of & ord shortening time

2-C 10/1—3

Attorney (s): Kindel & Anderson

√Petition Granted.